Supreme Court, U. S.
FILED
MAY 4 1979
MICHAEL RODAK, JR., CLERK

IN THE

United States Supreme Court

OCTOBER TERM, 1978

No. 78-1671

STATE OF NEW MEXICO, ex rel.
DODSON INSURANCE GROUP,
Appellant,

vs.

THE HONORABLE JAMES A. MALONEY,
JUDGE OF THE DISTRICT COURT,
SECOND JUDICIAL DISTRICT,
Appellee.

On Appeal From
The Supreme Court of New Mexico

JURISDICTIONAL STATEMENT

May 4, 1979

Mark B. Thompson
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IN THE

United States Supreme Court

OCTOBER TERM, 1978

No. .....

STATE OF NEW MEXICO, ex rel.
DODSON INSURANCE GROUP,
Appellant,

vs.

THE HONORABLE JAMES A. MALONEY,
JUDGE OF THE DISTRICT COURT,
SECOND JUDICIAL DISTRICT,
Appellee.

On Appeal From
The Supreme Court of New Mexico

JURISDICTIONAL STATEMENT

Dodson Insurance Group (Dodson) appeals from the final judgment of the Supreme Court of New Mexico dated February 7, 1979, quashing the Alternative Writ of Superintending Control and denying the Petition for Writ of Prohibition, thereby upholding the validity of §52-1-34 N.M.S.A. 1978 pursuant to which statutory authority the trial judge ordered Dodson to pay Plaintiffs' costs of discovery, prior to any determination, preliminary or otherwise, that Dodson might be liable in the cause.

OPINIONS BELOW

The Supreme Court of New Mexico in entering its final judgment did not file an opinion, but a copy of the order quashing the Alternative Writ of Superintending Control and denying the Writ of Prohibition is appended hereto

at page 16, *infra*. The order of the trial judge for which Dodson sought the Writ of Prohibition or Writ of Superintending Control is also appended hereto at page 17, *infra*.

JURISDICTION

Plaintiffs filed suit against the New Mexico Restaurant Association and Dodson Insurance Group in Bernalillo County District Court under the New Mexico Workmen's Compensation Act, §§52-1-1 to 52-1-69 N.M.S.A. 1978. Subsequently, in an original proceeding before the New Mexico Supreme Court, Dodson sought a writ of prohibition or in the alternative a writ of superintending control to vacate an order of the District Court entered pursuant to §52-1-34 N.M.S.A. 1978, ordering Dodson to pay for Plaintiffs' discovery costs prior to any determination, preliminary or otherwise, as to Dodson's ultimate liability in the action. An Alternative Writ of Superintending Control was granted on January 11, 1979, but after receiving briefs and hearing oral arguments on the questions of constitutional law raised below, on February 7, 1979, the Supreme Court of New Mexico quashed the Alternative Writ previously granted, thereby upholding the validity of the statute in question, §52-1-34 N.M.S.A. 1978. On March 6, 1979, Notices of Appeal were filed in both the New Mexico Supreme Court and the Bernalillo County District Court (the trial court), appended hereto at pages 18 and 19, *infra*.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2). Prior decisions of the Court sustaining jurisdiction include *Fisher v. District Court of Sixteenth Judicial District*, 424 U.S. 382 (1976); *Cohen v. California*, 403 U.S. 15 (1971); *Pan American Petroleum Corporation v. Superior Court of Delaware in and for Newcastle County*, 366 U.S. 656 (1961); *Madruga v. Superior Court*, 346 U.S.

556 (1954); and *Bandini Petroleum Company v. Superior Court*, 284 U.S. 8 (1931).

The statute claimed to be unconstitutional by Dodson is Vol. 8, §52-1-34 at p. 70, N.M.S.A. 1978 [N.M.S.A. Vol. 9-1, §59-10-13.9 at pp. 191-92 (1953 Comp.)]. It reads:

> "The Rules of Civil Procedure for the District Courts and the Supreme Court Rules shall apply to all claims, actions, and appeals under the Workmen's Compensation Act [52-1-1 to 52-1-69 N.M.S.A. 1978] except where provisions of the Workmen's Compensation Act directly conflict with these rules, in which case the provisions of the Workmen's Compensation Act shall govern. It is provided, however, that any interrogatories, discovery procedures and depositions authorized by the Rules of Civil Procedure shall be had only after motion of one of the parties therefor and the court having jurisdiction finds, after due hearing, that good cause exists, that the evidence to be obtained will probably be material to the issues of the cause and the court enters an order authorizing the same. The cost and expense of any interrogatory, discovery procedure or deposition ordered by the court shall be paid by the defendants in the claim or action and in no event shall any unsuccessful claimant be responsible for the cost or expense of any interrogatory, discovery procedure or deposition ordered by the court."

Dodson contends that the statute violates the following pertinent provisions of the Fourteenth Amendment to the Constitution of the United States.

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

QUESTIONS PRESENTED

1. Whether §52-1-34 N.M.S.A. 1978 violates the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States when applied to compel a defendant in a workmen's compensation action, who has denied that it is in any way liable in the action, to pay for a plaintiff's discovery costs prior to any hearing or determination by the trial court that the defendant is or probably will be liable to plaintiff on the merits of the action.

2. Whether §52-1-34 N.M.S.A. 1978 violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States when applied so that the only defendants in New Mexico who are compelled to finance a plaintiff's discovery costs, prior to any hearing or determination by the trial court that the defendants are or probably will be liable to the plaintiff on the merits of the action, are defendants in workmen's compensation lawsuits.

3. Whether §52-1-34 N.M.S.A. 1978, when applied to compel a defendant in a workmen's compensation lawsuit to finance a plaintiff's discovery cost, prior to any hearing or determination by the trial court that the defendant is or probably will be held liable to the plaintiff on the merits of the action, chills the defendant's right of access to the courts in violation of the Fourteenth Amendment of the Constitution of the United States.

4. Whether §52-1-34 N.M.S.A. 1978, on its face, violates the above-mentioned provisions of the Fourteenth Amendment by compelling all defendants in workmen's compensation lawsuits to pay for the plaintiff's discovery costs, by providing that even successful defendants shall pay for the discovery costs incurred by unsuccessful plaintiffs, and by providing that no plaintiff shall ever be responsible for his own discovery costs.

STATEMENT OF THE CASE

On September 26, 1978, Plaintiffs filed a workmen's compensation complaint in the Second Judicial District Court in and for Bernalillo County, New Mexico, alleging that on April 13, 1978, Plaintiffs' decedent suffered an injury in the course and scope of his employment. Plaintiffs' decedent apparently contracted botulism while attending a banquet presumably sponsored by the New Mexico Advisory Council on Technical Vocational Education, of which decedent was chairman. The lawsuit, however, was filed not against the New Mexico Advisory Council on Technical Vocational Education, but against the New Mexico Restaurant Association and its workmen's compensation insurer, Dodson Insurance Group. The Answer filed by Defendants raised fourteen separate defenses and vigorously contested liability on both factual and legal grounds.

The statute here at issue requires that a party obtain authorization from the court before proceeding with discovery. On November 6, 1978, Plaintiffs filed a Motion for Discovery. At the hearing held on December 14, 1978, to decide whether the Plaintiffs should be permitted to proceed with discovery, Defendants objected to the entry of any discovery order authorizing the Plaintiffs to proceed with discovery if that discovery was to be at Dodson's cost and expense. The court did not consider whether Dodson was or probably would be held liable at the time of trial but only considered whether discovery was necessary, even though Dodson raised the issue and contended that the statute was unconstitutional in requiring Dodson to pay, prior to the entry of judgment, Plaintiffs' discovery cost.[1]

[1]Transcript of the hearing, identified as Exhibit E to the Petition for Writ of Superintending Control or in the alternative, for Writ of Prohibition contained in the records to be certified to the United States Supreme Court by the New Mexico Supreme Court. (Dodson has requested that the record be certified but has not yet received the numerical listing of documents.)

The trial court, nevertheless, not only granted Plaintiffs leave to proceed with discovery, but also specifically provided that such discovery should be at Dodson's cost and expense. A copy of the order entered by the District Court is appended hereto at page 17, *infra*.

Thereafter, on January 11, 1979, Dodson filed in the New Mexico Supreme Court their original proceeding petitioning for a Writ of Prohibition or Writ of Superintending Control. In the Petition, Dodson continued to press its constitutional objections to the statute, as evidenced by paragraph 12, page 4 of the Petition:

> A Writ of Prohibition or Writ of Superintending Control is required because the respondent would deprive the petitioner of its constitutional rights of due process under Amendment XIV of the Constitution of the United States and Section 18 of the Constitution of the State of New Mexico and to deprive the petitioner of equal protection of the law under said constitutional provisions.[2]

On January 11, 1979, the New Mexico Supreme Court granted an Alternative Writ of Superintending Control and set the matter for briefing and oral arguments. The focus of all briefs as well as the oral arguments held on February 7, 1979, was the claim that the statute at issue violated the due process clause, the equal protection clause and a defendant's right of access to the courts guaranteed by the Fourteenth Amendment of the United States Constitution.[3] At the conclusion of oral arguments and after deliberation by the New Mexico Supreme Court, the Alternative Writ was quashed as being "improvidently granted".

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[2]The Petition forms part of the New Mexico Supreme Court Record. See Footnote 1, supra.

[3]Record of the Supreme Court of New Mexico. See Footnote 1, supra.

At every step of the proceedings, whether before the District Court or the Supreme Court of the State of New Mexico, the constitutional questions were clearly raised by the Defendants. Although the order quashing the Writ of Superintending Control does not state one way or another whether the constitutional questions were decided by the New Mexico Supreme Court, the necessary effect of the decision by the New Mexico Supreme Court was to uphold the validity of the New Mexico statute and deny the claims of Defendants that the statute was unconstitutional. When the necessary effect of an action by a state supreme court is to uphold the validity of the statute at issue and to deny the claims of unconstitutionality presented by one of the parties, the requirements of 28 U.S.C. §1257(2) have been met and the Supreme Court has jurisdiction to consider the matter on the merits. *Cohen v. California, supra; Street v. New York*, 394 U.S. 576 (1969); *Atchison, Topeka & Santa Fe Railway Company v. P.V.C.*, 346 U.S. 346 (1953); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928), (cited with approval in *Street, supra*); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921); *Kansas City Southern Railway Co. v. Road Improvement District 6 of Little River County, Ark.*, 256 U.S. 658 (1921).

That the necessary effect of the denial of the writ was to uphold the validity of the statute is clear. Absent the statutory authorization, the trial court had no power to enter an order compelling Dodson to pay Plaintiffs' discovery costs and expenses prior to the trial on the merits. *Read v. Western Farm Bureau*, 90 N.M. 369, 563 P.2d 1162 (Ct. App. 1977). *See also* the New Mexico Rules of Civil Procedure that are essentially identical to the Federal Rules of Civil Procedure. By refusing to grant the writ, the New Mexico Supreme Court upheld the order of the trial court that had been entered pursuant to §52-1-34 thereby uphold-

ing its validity. The writ was timely filed and the attacks on §52-1-34 were properly presented.

It is doubtful that Dodson may ever obtain a meaningful review of the trial court's action. As the prevailing party at the trial, Dodson would probably not have a right to appeal. Even if that right does exist, the appeal could not undo the harm already done for as this court recently held, even temporary deprivations of property are proscribed by the Fourteenth Amendment. *Fuentes v. Shevin*, 407 U.S. 67, 84 (1972). No doubt the New Mexico Supreme Court would correct a violation of fundamental constitutional rights on a petition for a writ if later appeals could not correct the error. Only by issuing the writ could the New Mexico Courts avoid this result; the denial of the writ implicitly upheld the validity of the statute.

The necessary effect of a denial of a writ when a party attacks on constitutional grounds a statute such as §52-1-34 that confers powers upon a court, is to hold that the statute does not violate the constitution in its grant of jurisdiction or power to act. Writs of prohibition, while at one time regarded as discretionary, have become mandatory when the trial court has no jurisdiction. *State ex rel. Transcontiental Bus Service v. Carmody*, 53 N.M. 367, 370, 208 P.2d 1073 (1949); *State Game Commission v. Tackett*, 71 N.M. 400, 379 P.2d 54 (1962). Actions by a court that exceed the bounds established by the constitution are acts in excess of jurisdiction for which a writ of prohibition will lie. *State ex rel. Hannah v. Armijo*, 37 N.M. 423, 24 P.2d 274 (1933); *Board of Commissioners of Guadalupe County v. District Court*, 29 N.M. 244, 233 Pac. 516 (1924). The writ is particularly appropriate when the action violates a defendant's right to due process and goes directly to a court's subject matter jurisdiction to enter a particular order. *See State ex*

rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933). By denying the writ the New Mexico Court necessarily held, therefore, that the statute violated no principles of constitutional law.

Certainly Dodson has contended in every proceeding that the enforcement of §52-1-34 by the District Court violated fundamental rights, violated due process rights, and violated the equal protection rights guaranteed by the Constitution. The cases are clear that when a court threatens to act in violation of these rights, the obligation of the New Mexico Supreme Court to issue the writ of prohibition is mandatory.

The only way the New Mexico Supreme Court could deny the writ of prohibition would be to hold that there had been no violation of the constitution affecting fundamental rights and that the constitution does not prohibit a legislature from granting a court power to take property from a defendant without hearing to pay for a plaintiff's discovery even though that plaintiff may be entitled to no compensation whatsoever from the defendant at the time of trial. The absence of a record specifying the reasons for the decision of the New Mexico Supreme Court fails to detract from the jurisdiction of the Court. The "necessary effect" of the denial of the writ, therefore, was to uphold the validity of the statute.

• • •

Pursuant to the doctrines expressed in *Fusari v. Steinberg*, 419 U.S. 379 (1975) Dodson would inform the court of matters occurring subsequent to the filing of the Notices of Appeal although Dodson is of the opinion that the matters to be presented are irrelevant to the jurisdiction of the court. The day following the filing of the Notices of Appeal, Plaintiffs attempted to moot the appeal by asking

the trial court to recognize a withdrawal of their Motion for Discovery, requesting the trial court to vacate the discovery order, and further moving the trial court to lift its stay order pending the resolution of this appeal to the Supreme Court. The trial court granted these requests on March 12, 1979, six days after the Notices of Appeal were filed.

At that point, Dodson again petitioned the New Mexico Supreme Court for a writ of prohibition vacating the March 12 order which had recognized the withdrawal of the discovery motion, vacated the discovery order and lifted the stay of proceedings pending the outcome of this appeal. The Alternative Writ of Prohibition was granted on March 21, 1979. Following briefing and oral arguments, the New Mexico Supreme Court made the Alternative Writ of Prohibition permanent on April 18, 1979. This writ assured that the case would be preserved in the status it held as of the time the Notices of Appeal were filed. Dodson Insurance Group is still under court order to pay for Plaintiffs' discovery, Plaintiffs have not yet been permitted to withdraw their motion for discovery, the stay of proceedings pending the resolution of this appeal is still in effect, and the parties are properly before the Court.

The situation is analagous to *Kerr v. United States District Court*, 426 U.S. 394 (1975), footnotes 4 and 5, in which the Court recognized the possibility of yet another reversal in position by the plaintiffs and therefore denied the claim of mootness, even though the plaintiffs had offered to withdraw their request for production. In *United States v. Concentrated Phosphate Export Association*, 393 U.S. 197, 203 (1968) the Court pointed out that if the Court held the case moot the defendant would be "free to return to his old ways," even though that defendant had at that time voluntarily ceased the illegal conduct.

Furthermore, as pointed out at page 8, *supra*, if Dodson wins the case on the merits and receives the relief requested in its Answer, as the prevailing party it is doubtful that a meaningful review of the discovery order could be obtained. The case therefore is one "capable of repetition but evading review." *Dunn v. Blumstein*, 405 U.S. 330, 333 (1972); *Roe v. Wade*, 410 U.S. 113, 125 (1973). Without this appeal, Dodson may never obtain proper review of the violation of its constitutional rights.

Because of the continuing activities of Dodson as a workmen's compensation insurer in New Mexico, the question is one agitated by its persisting programs as an insurer. *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 179 (1968). When the continuing effect of the trial court's order is combined with the probability of yet another reversal by Plaintiffs and the persistance of the question by reason of Dodson's activities as a workmen's compensation insurer, it is clear that this case presents a justiciable controversy mandating review by this Court.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The cases previously cited to sustain jurisdiction are cases in which the Court has recognized that the granting or denying of writs or prohibition or superintending control in original proceedings before state supreme courts are final judgments subject to review under 28 U.S.C. §1257(2). The original proceeding in this cause, in the New Mexico Supreme Court, was just such a proceeding and the final judgment of the New Mexico Supreme Court quashing the Alternative Writ of Superintending Control and thereby denying the Writ of Prohibition fits squarely within the definition of finality used in the cases cited. The Statement of the Case demonstrated the adequate presentation of a

federal question and confirmed the absence of adequate state grounds that would otherwise interfere with the exercise of this Court's jurisdiction.

Although certain constitutional principles are well recognized, their applicability to discovery costs in workmen's compensation litigation has not been decided.[4] The necessity of judicial hearings prior to a deprivation of property has been well recognized in garnishments, *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969); *North Georgia Finishing Inc. v. Dichen, Inc.*, 419 U.S. 601 (1975), the revocation of drivers' licenses, *Bell v. Burson*, 402 U.S. 535 (1971); and replevin, *Fuentes v. Shevin*, 407 U.S. 67 (1972). Equally well established is the principle that a "fundamental requisite of due process of law is the opportunity to be heard." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Grannis v. Ordean*, 234 U.S. 385, 394 (1913).

In this case the trial court entered its order compelling Defendant to pay Plaintiffs' discovery costs without the benefit of a hearing, preliminary or final, on the Defendants' ultimate liability. The hearing held by the trial court went only to Plaintiff's need to conduct the discovery. Liability is a prerequisite in New Mexico to the award of medical expenses, *State ex rel. J. P. (Bum) Gibbons v. District Court*, 65 N.M. 1, 330 P.2d 964 (1958), attorneys' fees, *Scott v. Southwestern Tankers, Inc.*, 73 N.M. 219, 387 P.2d 327 (1963) and workmen's compensation benefits, §52-1-9 N.M.S.A. 1978, but §52-1-34 ignores that scheme of liability in compelling all defendants to pay the expenses of a plaintiff's discovery steps. Under the line of cases commencing with *Sniadach, etc., supra*, neither the courts nor the statute at issue may ignore that question of liability in depriving Dodson of its property. The question now raised is whether the rationale of these cases can be extended to workmen's compensation litigation.

[4]The New Mexico Supreme Court ruled that the use of workmen's compensation boards violate the New Mexico Constitution so all workmen's compensation actions are heard by the district courts. Expressions by this Court of principles pertaining to civil actions would, therefore apply to New Mexico workmen's compensation actions. *State ex rel. Hovey Concrete Products Co. v. Mechem*, 63 N.M. 250, 316 P.2d 1069 (1957).

In other decisions, framed "in light of cases that delimit rights of defendants compelled to litigate their differences in a judicial forum," this Court has acknowledged that the Fourteenth Amendment also encompasses the right of free and unchilled access to the courts. *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971); *Bounds v. Smith*, 430 U.S. 817 (1977). This court, however, has not determined if the broad and all inclusive obligation of a defendant in a New Mexico workmen's compensation action to pay for all of a plaintiff's discovery costs, even when a defendant is the ultimate victor at trial, chills the defendant's right to litigate his differences with the plaintiff. If the New Mexico Supreme Court denial of the Writ of Prohibition is permitted to stand, a defendant would be forced to finance a plaintiff's lawsuit even though the defendant knows that the lawsuit is frivolous, without merit, and unworthy of serious consideration. The nuisance value of such lawsuits would assume an entirely new complexion and would transform the cases from nuisances into substantial threats.

For decades the states have assumed that they may treat defendants in workmen's compensation or wage earning cases different from other defendants. See, *e.g., Missouri, Kansas & Texas Railway Co. of Texas v. Cade*, 233 U.S. 642 (1914). Dodson does not attack this basic distinction. The rationale behind those cases, however, has been that an *unsuccessful* defendant should bear the burden

of contesting liability of a claim ultimately found to be just and proper. In this case, if the rulings are permitted to stand, the legislation penalizes defendants who *successfully* prove the absence of liability against them. For asserting their rights and contesting invalid claims, the statute punishes otherwise successful defendants. There is no rational justification for the existence of this law.

CONCLUSION

Whether this Court refers to the statute on its face or to its application by the trial court, the denial of the writ of prohibition by the New Mexico Supreme Court contravenes fundamental constitutional rights. Dodson should be given an opportunity to prove that principles of constitutional law previously applied to analagous cases hold equal persuasion to the facts at hand.

For these reasons, Appellant, Dodson Insurance Group, respectfully requests the Court to note probable jurisdiction, to set the matter for full briefing, and to permit oral arguments.

Respectfully submitted.

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Attorneys for Appellant

I hereby certify pursuant to Supreme Court Rule 33(3) (a) that on the Fourth day of May, 1979, I caused three copies of the foregoing to be hand delivered to Ronald Segel, 600 First Plaza, Albuquerque, New Mexico; The Honorable James E. Maloney, Bernalillo County Courthouse, Albuquerque, New Mexico; and Harold Parker, 1300 Bank of New Mexico Building, Albuquerque, New Mexico, and that all parties required to be served have been served.

MARK B. THOMPSON
Attorney of Record for Dodson Insurance Group
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Albuquerque, New Mexico 87103

Supreme Court, U. S.
FILED
MAY 4 1979
MICHAEL RODAK, JR., CLERK

IN THE

United States Supreme Court

OCTOBER TERM, 1978

No. 78-1671

STATE OF NEW MEXICO, ex rel.
DODSON INSURANCE GROUP,
Appellant,

vs.

THE HONORABLE JAMES A. MALONEY,
JUDGE OF THE DISTRICT COURT,
SECOND JUDICIAL DISTRICT,
Appellee.

On Appeal From
The Supreme Court of New Mexico

APPENDIX TO JURISDICTIONAL STATEMENT

May 4, 1979

Mark B. Thompson III
Post Office Box 2168
Albuquerque, New Mexico 87103
Attorneys for Appellant

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

Wednesday, February 7, 1979

NO. 12,345

DODSON INSURANCE GROUP,
Insurer,

Petitioner,

vs. Original Proceeding on Superintending Control

HON. JAMES A. MALONEY,
Respondent.

This matter coming on for consideration by the Court upon alternative writ of superintending control, with copy of petition attached, response to writ and briefs of counsel, and the Court having heard oral argument and now being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that the alternative writ of superintending control heretofore issued in this matter on January 11, 1979 be and the same is hereby quashed as having been improvidently issued.

ATTEST: A TRUE COPY
ROSE MARIE ALDERETE
Clerk of the Supreme Court
of the State of New Mexico

STATE OF NEW MEXICO COUNTY OF BERNALILLO
IN THE DISTRICT COURT

ELIZABETH COWPER, et al.,
Plaintiffs,
v.
NEW MEXICO RESTAURANT ASSOCIATION, INC., et al.,

No. CV-78-06242

STAMP
Filed in My Office
This Dec. 14 '78 P.M.
Eloise E. Young,
Clerk District Court

ORDER

This matter having come before the Court upon the motion of Plaintiffs for leave to propound written interrogatories to Defendants and to take the deposition of Francis Durkin, and the Court finding that the evidence to be obtained will probably be material to the issues of the cause,

THE COURT ORDERS that Plaintiffs be, and they hereby are, granted leave to propound written interrogatories to Defendants and to take the deposition of Francis Durkin, at defendant's cost.

JAMES A. MALONEY
District Judge

12-14-78
In Court After Hearing
on Record
w / Segal & Roehl Present
JM

MAR 6 1979

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

DODSON INSURANCE GROUP, Insurer,
Petitioner,
vs. No. 12,345

HON. JAMES A. MALONEY,
Respondent.

NOTICE OF APPEAL
TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that DODSON INSURANCE GROUP, the Petitioner above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Mexico entered on February 7, 1979, quashing the Alternative Writ of Superintending Control issued by the Supreme Court of New Mexico on January 11, 1979.

This appeal is taken pursuant to 28 U.S.C., Section 1257(2).

MODRALL, SPERLING, ROEHL
HARRIS & SISK

By THOMAS L. JOHNSON
Attorney for the Petitioner
Post Office Box 2168
Albuquerque, New Mexico 87103
505 243-4511

ATTEST: A TRUE COPY
ROSE MARIE ALDERETE
Clerk of the Supreme Court
of the State of New Mexico

STATE OF NEW MEXICO COUNTY OF BERNALILLO
IN THE DISTRICT COURT

ELIZABETH COWPER, Individually and as next friend of CAROLYN COWPER and NANCY COWPER, minors, ANN COWPER and LOIS COWPER,
Plaintiffs,

vs. No. CIV 78-06242

NEW MEXICO RESTAURANT ASSOCIATION, INC., employer, and DODSON INSURANCE GROUP, insurer,
Defendants.

ENDORSED
FILED IN MY
OFFICE THIS
MAR 6 1979
ELOISE E. YOUNG
Clerk District Court

NOTICE OF APPEAL
TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that DODSON INSURANCE GROUP, the Defendant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Mexico entered on February 7, 1979, quashing the Alternative Writ of Superintending Control, issued by the Supreme Court of New Mexico on January 11, 1979.

This appeal is taken pursuant to 28 U.S.C., Section 1257(2).

MODRALL, SPERLING, ROEHL,
HARRIS & SISK

By .....
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Supreme Court, U. S.
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IN THE

UNITED STATES SUPREME COURT

October Term, 1978

No. 78-1671

STATE OF NEW MEXICO, ex rel.
DODSON INSURANCE GROUP,

Appellant,

v.

THE HONORABLE JAMES A. MALONEY,
JUDGE OF THE DISTRICT COURT,
SECOND JUDICIAL DISTRICT,

Appellee.

On Appeal From
The Supreme Court of New Mexico

MOTION TO DISMISS OR REMAND

and

SUPPORTING BRIEF

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IN THE UNITED STATES SUPREME COURT

STATE OF NEW MEXICO, ex rel. DODSON INSURANCE GROUP, Appellant,	)	
v.	)	No. 78-1671
THE HONORABLE JAMES A. MALONEY, JUDGE OF THE DISTRICT COURT, SECOND JUDICIAL DISTRICT, Appellee.	)	

MOTION TO DISMISS OR TO REMAND

Appellee moves the Court, pursuant to Rule 16 of the rules of this Court, for an order dismissing the appeal. As grounds for this motion, Appellee states that the appeal is not within the jurisdiction of this Court, because it is not taken in conformity to statute; that the question to be presented on appeal is moot; and that the

appeal does not present a substantial federal question.

In the alternative, Appellee moves the Court to remand this action for trial on its merits pending the determination by this Court of the constitutional question asserted by Appellant, on the ground that the trial of this action cannot be affected by the result of this appeal and the trial should not be delayed until after the appeal has been decided.

Respectfully submitted,

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IN THE UNITED STATES SUPREME COURT

STATE OF NEW MEXICO, ex rel. DODSON INSURANCE GROUP, Appellant, v. THE HONORABLE JAMES A. MALONEY, JUDGE OF THE DISTRICT COURT, SECOND JUDICIAL DISTRICT, Appellee.	No. 78-1671

ON APPEAL FROM THE
SUPREME COURT OF NEW MEXICO

BRIEF IN SUPPORT OF MOTION
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POINT I

THE APPEAL SHOULD BE DISMISSED BECAUSE IT IS NOT WITHIN THE JURISDICTION OF THIS COURT, NOT HAVING BEEN TAKEN IN CONFORMITY TO STATUTE

A. The Order Appealed From is Not a Final Judgment.

SUMMARY: The appellant purports to appeal from a state court order quashing a writ of superintending control, which order is not final and appealable.

By this appeal, appellant (the "insurer") seeks to challenge the constitutional validity of that portion of the New Mexico Workmen's Compensation Act which requires the workmen's compensation insurance carrier, or the employer itself if self-insured, to bear the cost of discovery authorized by the trial court. N. M. Stat. Ann. § 52-1-34 (1978). The order from which the insurer seeks to appeal is an order of the New Mexico Supreme Court quashing an

alternative writ of superintending control which it had previously issued (Appendix to jurisdictional statement, p. 16). In seeking that writ, the insurer contended that the trial court, by ordering the insurer to pay for a deposition which was to be taken by the claimants, had incorrectly interpreted the statute. Alternatively, the insurer contended that the statute violated the state and federal constitutions. The New Mexico Supreme Court issued an alternative writ, on an ex parte basis, and directed the trial court not to proceed with any discovery by the claimants at the cost of the insurer (See record certified by New Mexico Supreme Court). After hearing argument, the New Mexico Supreme Court quashed the alternative writ on the ground that it had been improvidently issued.

The function of a writ of superintending control under New Mexico law is to see that inferior courts do not depart from proper judicial activity, become dictatorial or oppressive

in their conduct, or otherwise behave improperly so as to shake public confidence in the administration of justice and the judiciary. STATE ex rel. ANAYA v. SCARBOROUGH, 75 N.M. 702, 410 P.2d 732 (1966). The power of superintending control may be invoked when the lower court has issued an order which is erroneous, arbitrary and tyrannical, or would be gross injustice, and there is no plain, speedy and adequate remedy unless the writ is issued. STATE ex rel. SERNA v. HODGES, 89 N.M. 351, 552 P.2d 787 (1976); STATE v. ZINN, 80 N.M. 710, 460 P.2d 240 (1969). The writ of superintending control is not used to test the trial court's jurisdiction. In New Mexico, as elsewhere, the writ used to restrain an inferior court from acting without jurisdiction is the writ of prohibition. STATE ex rel. BIRD v. APODACA, 91 N.M. 279, 573 P.2d 213 (1977).

The order of the New Mexico Supreme Court quashing the writ of superintending control, from which order

the insurer seeks to appeal, is not a final judgment within the meaning of 28 U.S.C. § 1257. The insurer's jurisdictional statement cites, at pages 2 and 3, several cases for the proposition that the judgment of a highest state court in a proceeding involving a writ of prohibition is final and appealable. Those cases are all inapposite. Cases which deal with writs of prohibition necessarily involve the jurisdiction of the inferior court. This Court has traditionally held that a final state court determination as to a lower court's jurisdiction is final and appealable. In contrast, the proceeding in the New Mexico Supreme Court, which resulted in the order from which the insurer seeks to appeal, had nothing to do with the jurisdiction of the trial court. In that proceeding neither the argument of the insurer nor the order of the New Mexico Supreme Court addressed the question of the trial court's jurisdiction. The cases holding that final decisions in state court prohibition

proceedings are appealable are thus of no benefit here.

SUMMARY: The order from which the appellant seeks to appeal is interlocutory because it does not finally resolve the ultimate issues in the case.

The determination whether a judgment is final and appealable within the meaning of 28 U.S.C. § 1257 is a question purely of federal law. GOTTHILF v. SILLS, 375 U.S. 79 (1963). For a judgment of a state appellate court to be final and reviewable by this Court, that judgment must end the litigation on the merits by finally determining the rights of the parties, so that nothing remains to be done by the trial court except the ministerial act of entry of the judgment which the appellate court has directed. GOSPEL ARMY v. CITY OF LOS ANGELES, 331 U.S. 543 (1947); CATLIN v. UNITED STATES, 324 U.S. 229 (1945). The requirement of finality is not satisfied even when "the major issues in a case have been decided

and only a few loose ends remain to be tied up - for example, where liability has been determined and all that needs to be adjudicated is the amount of damages." REPUBLIC NATURAL GAS CO. v. STATE OF OKLAHOMA, 334 U.S. 62 (1948). None of the major issues in this case has yet been decided by the trial court.

In determining the appealability of the order of the New Mexico Supreme Court, this Court should consider the substance and the underlying subject matter of that order. The insurer's proceeding in the New Mexico Supreme Court was an attack not on any determination of the merits of the case, but rather on the propriety of a discovery order. Matters relating to discovery are interlocutory, not final, and are therefore not appealable. BROWNING DEBENTURE HOLDERS' COMMITTEE v. DASA CORP., 524 F.2d 811 (2d Cir. 1975); GIALDE v. TIME, INC., 480 F.2d 1295 (8th Cir. 1973); GOSA v. SECURITIES INVESTMENT CO., 449 F.2d 1330 (5th Cir.

1971). As the Second Circuit noted in AMERICAN EXPRESS WAREHOUSING, LTD. v. TRANSAMERICA INSURANCE CO., 380 F.2d 277 (2d Cir. 1967), the sound reasons for denying appeal from discovery orders include elimination of unnecessary appeals, since the complaining party may win the case or settle it, the potential for harassment of litigants by nuisance appeals, and the fact that any appeal tends to delay or deter final resolution of a lawsuit.

The general purpose of the finality requirement of 28 U.S.C § 1257 was explained as follows in RADIO STATION WOW, INC. v. JOHNSON, 326 U.S. 120 (1945):

> This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This

> prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation only after 'the highest court of a State in which a decision in the suit could be had' has rendered a 'final judgment or decree.' § 237 of the Judicial Code, 28 U.S.C § 344(a). This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our Federal system. 326 U.S. at 124.

Although the concept of finality has been expanded in recent years, the basic policy remains intact. Six years ago, the Court in NORTH DAKOTA STATE BOARD OF PHARMACY v. SNYDER'S DRUG STORES, INC., 414 U.S. 156 (1973), observed that the finality requirement avoids piecemeal review by federal courts of state court decisions, avoids

the giving of advisory opinions where no case or controversy exists, and limits federal review of state court decisions on constitutional questions so as to minimize federal intrusion in state affairs. Under the general principles of finality to which this Court has adhered for many years, the order of the New Mexico Supreme Court simply cannot be construed as final and appealable, or as justifying federal intrusion in state affairs.

The insurer's suggestion that it may never obtain proper review of the trial court's action is specious. This is a case that remains to be tried on its merits, regardless of the outcome of this appeal. Nothing in the order of the New Mexico Supreme Court suggests that the insurer would not be free to raise the question of the constitutionality of the challenged statute in the appellate courts of the State of New Mexico following the entry of judgment after trial on the merits. Even if the insurer were to prevail on the liability

issues, yet be assessed the costs of the claimants' discovery, the insurer would have a right of appeal from that portion of the judgment taxing costs against it, see RUIDOSO STATE BANK v. BRUMLOW, 81 N.M. 379, 467 P.2d 395 (1970), and could squarely raise the constitutional question in that appeal. New Mexico law holds that a writ of superintending control does not perform the office of an appeal. STATE ex rel. TRANSCONTINENTAL BUS SERVICE v. CARMODY, 53 N.M. 367, 208 P.2d 1073 (1949). Appeal within the appellate courts of New Mexico would be a proper way for the insurer to obtain further state review of the constitutional question. The order of the New Mexico Supreme Court is interlocutory only, in that it does not address the question of the relief, if any, which is ultimately to be accorded to the plaintiffs. Review of interlocutory orders must await appeal from the final judgment in the case. GENERAL ELECTRIC CO. v. MARVEL RARE METALS CO., 287 U.S. 430 (1932).

B. The Order Appealed From Was Not a Ruling in Favor of the Validity of the Challenged Statute.

SUMMARY: The order from which the appellant seeks to appeal did not determine that the challenged statute is constitutional.

The statute under which the insurer claims a right to appeal, 28 U.S.C. § 1257, requires, in addition to a final judgment, a judgment which determines that the challenged state statute is not repugnant to the federal constitution. This Court has jurisdiction on appeal only if the question of the constitutionality of the statute has been "actually considered and decided" by the highest state court. See CHARLESTON FEDERAL SAVINGS AND LOAN ASSOCIATION v. ALDERSON, 324 U.S. 182 (1945); MANHATTAN LIFE INSURANCE CO. v. COHEN, 234 U.S. 123 (1914). The determinative question is thus not whether the constitutional issue was argued, as the insurer suggests, but rather whether that issue was heard and determined.

The order of the New Mexico Supreme Court gives no indication that the question of the constitutional validity of the statute attacked by the insurer was actually considered and decided. The appellate jurisdiction of this Court does not extend to judgments which do not clearly appear to have upheld a state law against constitutional attack. Appellate jurisdiction cannot be based on surmise as to the basis of the state court's ruling. LYNCH v. PEOPLE OF NEW YORK ex rel. PIERSON, 293 U.S. 52 (1934). This Court said in LYNCH that:

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the

> determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. [Citing cases] 293 U.S. at 54.

Whether the order of the New Mexico Supreme Court was based to any extent upon consideration of the federal constitutional question is a matter of surmise. One can logically assume that the basis for quashing the alternative writ of superintending control was the New Mexico court's determination to let the underlying action proceed and to postpone consideration of the constitutional question until after a trial on the merits. This Court may properly refuse to take jurisdiction when the highest court of a state has delivered no opinion and the judgment might have been based on a non-federal ground. DURLEY v. MAYO, 351 U.S. 277 (1956); STEMBRIDGE v. GEORGIA, 343 U.S. 541 (1952). Because the order of the New Mexico Supreme Court leaves to conjecture the ground on which it was

based, one cannot say that the validity of the challenged statute has been upheld. The order of that court is therefore not an appealable judgment or decree.

POINT II

THE APPEAL SHOULD BE DISMISSED BECAUSE THE ISSUE SOUGHT TO BE DECIDED IS MOOT

SUMMARY: Events which occurred in the trial court since the notice of appeal was filed have mooted the question presented by the appellant.

The sole question which the insurer seeks to raise in this appeal is the constitutionality of that provision of the New Mexico Workmen's Compensation Act which requires an employer or its insurance carrier to bear the cost of any discovery authorized by the trial court. That question arose because the trial court entered the discovery order which appears at page 17 of the appendix to the insurer's jurisdictional statement. As the insurer correctly points

out, the claimants in the underlying workmen's compensation action have now withdrawn their request for discovery in an effort to get their case to trial without the delay which would inevitably result from the insurer's effort to have this Court decide the constitutionality of the New Mexico statute. Reproductions of the claimants' withdrawal of their discovery motion, and their motion to vacate the trial court's discovery order, are appended hereto at pages 30 and 33.

The insurer's objection to the proceedings in the trial court is that the trial judge ordered the insurer, in advance of a determination of the insurer's liability, to pay the cost of a deposition to be taken by the claimants. Because the claimants formally waived their right to take that deposition at the cost of the insurer, the question of the trial court's authority to require the insurer to bear the cost of the deposition is now moot. The claimants determined that getting their

case to trial without procedural delays which cause the loss of evidence, because of the fading of memories and the unavailability of witnesses, was more important than obtaining the discovery which they sought. Because the claimants withdrew their discovery motion, the decision of this Court on the constitutional question would have no effect whatsoever on the trial of the underlying action.

SUMMARY: The requirement of a continuing case or controversy is not satisfied in this action because the plaintiffs below have abandoned their rights under the statute which is claimed by the appellant to be unconstitutional.

This Court has long held that its authority is limited by the "case or controversy" requirement of U.S. Const. Art. III, § 2. As the Court said in MILLS v. GREEN, 159 U.S. 651 (1895):

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into

> effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. 159 U.S. at 653.

The MILLS rationale was restated in KIMBALL v. KIMBALL, 174 U.S. 158 (1899), in which the Court stated that it "is not empowered" to decide moot questions or abstract propositions, or to declare for use in future cases, rules of law which cannot affect the result as to the thing in issue in the case presently before the Court.

The constitutional limitation against deciding moot questions has been reaffirmed by the Court in recent years. The Court has stated that it is limited by the case or controversy requirement of Article III to the adjudication of actual disputes between adverse parties, RICHARDSON v. RAMIREZ, 418 U.S. 24 (1974), and that Article III requires those who invoke the jurisdiction of any federal court to show the

existence of an actual case or controversy. O'SHEA v. LITTLETON, 414 U.S. 488 (1974). Considerations of prematurity and abstractness will cause the Court to decline appellate jurisdiction if the appellant is not being injured by the challenged statute. SOCIALIST LABOR PARTY v. GILLIGAN, 406 U.S. 583 (1972).

In one of the leading mootness decisions in recent years, DeFUNIS v. ODEGAARD, 416 U.S. 312 (1974), the Court noted that the question of mootness, even in cases arising in the state courts, remains a question of federal law, and must be decided in light of the Article III limitation. This rule applies, the Court said, even if the state court might decide the question because of "great public interest." Significant to the issues in this case was the DeFUNIS Court's observation that an actual controversy is required at all stages of appellate review, not merely at the date on which the action is initiated. The Court concluded that the case before it was moot, because the

controversy between the parties had ceased to be definite and concrete and no longer touched the legal relations of parties having adverse legal interests.

Assuming that a definite and concrete dispute existed between the parties to the workmen's compensation action which underlies this appeal, that dispute has now ceased to exist. The claimants have mooted this action by filing a written withdrawal of their discovery motion, and by moving to vacate the order which the insurer seeks to challenge in this Court. The insurer attempts to rescue this case from the jaws of mootness by suggesting that the claimants may change their minds and again seek to have the insurer pay for their discovery costs. Appellate jurisdiction should not be based on speculation as to an event which does not appear likely to occur. The claimants have represented, and continue to represent to the trial court, to the Supreme Court of New Mexico, and now to this Court, that they have abandoned

their claim of right to undertake, at the insurer's cost, the discovery sought in their motion.

This Court does not sit to decide arguments after events have put them to rest. DOREMUS v. BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, 342 U.S. 429 (1952). No difficulty exists in concluding that an issue is moot if a party pursuing a particular claim chooses to drop that claim completely. 13 Wright, Miller and Cooper Federal Practice and Procedure § 3533, at 738 (1975); see LUNZ v. PREISER, 524 F.2d 289 (2d Cir. 1975). This Court should not countenance the insurer's effort to continue litigating an issue which has disappeared from the case. As the Court said in KIMBALL v. KIMBALL, supra, there is "no reason for this Court's assuming to decide a question, the decision of which cannot affect the relief to be ultimately granted in this case."

POINT III

THE APPEAL SHOULD BE DIMISSED BECAUSE IT PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

SUMMARY: No substantial federal question is involved in this case because of the mootness of the issue sought to be raised.

This Court has for many years followed the rule that it will decline to entertain a case which, although otherwise within the Court's appellate jurisdiction, raises no substantial federal question. ZUCHT v. KING, 260 U.S. 174 (1922); EQUITABLE LIFE ASSURANCE SOCIETY v. BROWN, 187 U.S. 308 (1902). An appeal will be dismissed if resolution of the constitutional issues presented by the appellant would not be appropriate in the circumstances of the case. DeBACKER v. BRAINARD, 396 U.S. 28 (1969). The question of the constitutional validity of the discovery provisions of the New Mexico Workmen's Compensation Act, in the factual context of this case, is so insubstantial as to

be unworthy of further consideration by this Court.

The existence of a substantial federal question requires more than the mere assertion of a claim in respect of some constitutional right. There must be a real and substantial controversy of the required character which deserves serious consideration. UNITED STATES FIDELITY AND GUARANTY CO. v. STATE OF OKLAHOMA, 250 U.S. 111 (1919); NEW ORLEANS WATERWORKS CO. v. STATE OF LOUISIANA, 185 U.S. 336 (1902). A real, as distinguished from fictitious, federal question is essential to this Court's jurisdiction over the judgments of state courts. SAWYER v. PIPER, 189 U.S. 154 (1903). This court noted in SAWYER that, without such a requirement, a federal question might be set up in almost any case and the jurisdiction of this Court invoked "simply for the purpose of delay."

One factor to be considered in determining the existence of a substantial federal question is whether the

case presents a live, concrete dispute. No substantial federal question is involved if the possible invasion of the appellant's constitutional rights is wholly a matter of conjecture. ABRAMS v. VAN SCHAICK, 293 U.S. 188 (1934). By relinquishing their right to conduct discovery at the insurer's expense, the claimants in the underlying case have made moot the question presented by the insurer. A merely abstract or moot federal question is not a substantial federal question. LITTLE v. BOWERS, 134 U.S. 547 (1890). The Court in LITTLE, quoting from an earlier opinion of Chief Justice Taney, said:

> It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves, and to do this upon the full hearing of both parties. And any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court.

The insurer's desire to continue litigating an issue which the claimants have conceded, evidences nothing more than a purpose to cause delay. A case which is flawed by such a purpose presents no substantial federal question. The insurer's appeal should therefore be dismissed.

POINT IV

EVEN IF THE APPEAL IS NOT DISMISSED, THE UNDERLYING ACTION SHOULD BE REMANDED FOR TRIAL

SUMMARY: If this appeal is within the Court's jurisdiction, the plaintiffs below should not be prevented from trying their lawsuit before the appeal is concluded, the result of the appeal being immaterial to the issues to be tried.

The claimants in the underlying workmen's compensation action have waived or abandoned their right to conduct, at the cost of the insurer, the discovery sought in their motion. The claimants are prepared to try the case on its merits, without such discovery at the insurer's cost. Therefore, even if this Court were to note probable jurisdiction to decide the constitutional question asserted by the insurer, no reason would exist why the case could not simultaneously proceed to trial on the question of the insurer's liability to the claimants for workmen's compensation. Appellee respectfully requests the Court, if it determines that the constitutional issue is properly before it, to partially remand the case for trial on the merits.

The concept of allowing a trial court to proceed to hear and determine certain aspects of a case, while at the same time another aspect of the case is pending before an appellate court, is a familiar one in the law. Jurisdiction

as to an entire cause is not transferred in a proceeding in a federal appellate court for the review of an incidental or interlocutory matter, and such an appeal does not divest the trial court of a jurisdiction to proceed with matters not involved in the appeal. EX PARTE NATIONAL ENAMELING AND STAMPING CO., 201 U.S. 156 (1906); UNITED STATES v. CITY OF CHICAGO, 534 F.2d 708 (7th Cir. 1976); COMPANIA ESPANOLA DE PETROLEOS v. NEREUS SHIPPING, 527 F.2d 966 (2d Cir. 1975), cert. den. 426 U.S. 936 (1976); DePINTO v. PROVIDENT SECURITY LIFE INSURANCE CO., 374 F.2d 50 (9th Cir. 1967). Appellee requests that this Court authorize the kind of procedure followed in GRAND CENTRAL MINING CO. v. MAMMOTH MINING CO., 36 Utah 364, 104 P. 573 (1909), in which one portion of the case was allowed to proceed to trial while another portion was pending in this Court.

The notion that the pendency of an appeal need not divest a trial court of all jurisdiction has been approved by

at least one state court in the context of a workmen's compensation action. The reasoning of the Arizona Supreme Court in CONTINENTAL CASUALTY CO. v. THE INDUSTRIAL COMMISSION, 111 Ariz. 291, 528 P.2d 817 (1974), is persuasive here. In that case, the court held that the Industrial Commission retained jurisdiction to consider those matters not directly involved in the case pending in the appellate court. Quoting from the opinion of the Arizona Court of Appeals in an earlier case, the court said:

> By allowing the trial court to proceed with issues not directly involved in, or the subject matter of the appeal, the jurisdiction of the appellate court is adequately protected, and at the same time the trial court proceedings are not inordinately delayed pending the appellate decision. 528 P.2d at 820.

Inordinate delay is especially harmful in actions which, like a workmen's compensation action, are entitled

by statute to be advanced on the trial court's calendar and tried in as summary a fashion as possible. N.M. Stat. Ann. § 52-1-35 (1978). In order to avoid inordinate delay, appellee submits that this Court can properly remand for trial even if it takes jurisdiction to decide the constitutional question.

CONCLUSION

This case is not within the appellate jurisdiction of this Court. The order from which the insurer purports to appeal is not an appealable order. The question presented by the appeal is moot. A substantial federal question is lacking. Appellee therefore respectfully requests this Court to dismiss the appeal, and to direct the New Mexico Supreme Court to vacate its writ of prohibition which restrains the trial court from proceeding any further with the case, pending the final resolution of this appeal. In the alternative, appellee requests that this Court, if it notes probable jurisdiction, remand the

underlying workmen's compensation action to the New Mexico Supreme Court with instructions to allow the trial court to hear the action on its merits, without having to await this Court's decision on this appeal.

Respectfully submitted,

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I hereby certify that three copies of the foregoing motion to dismiss or to remand, and brief in support thereof, were hand delivered this _____ day of _____, 1979 to counsel of record for appellant, and that all parties required to be served have been served.

Ronald Segel

STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

ELIZABETH COWPER, et al.,
Plaintiff,
v.
No.CV-78-06242
NEW MEXICO RESTAURANT ASSOCIATION, INC., employer, and DODSON INSURANCE GROUP, insurer,
Defendant.

STAMP
Filed in My Office This
March 7, 1979
Eloise E. Young,
Clerk District Court

WITHDRAWAL OF MOTION

Plaintiffs having filed a motion for discovery on November 27, 1978, in order to obtain reasonable and necessary discovery before trial, an order having been entered on December 14, 1978

allowing such discovery at defendant's cost, defendant insurer having unsuccessfully sought review of that order in the New Mexico Supreme Court by way of prerogative writ, defendant insurer having suggested to the Court that an appeal involving the December 14, 1978, discovery order may be taken to the United States Supreme Court and now having filed notice of such an appeal, this Court having refused to allow plaintiffs to conduct discovery since the entry of the December 14, 1978, order, and it appearing to plaintiffs that this Court may decline to try their workmen's compensation claim as scheduled on March 26, 1979 because of the pendency of such appeal to the United States Supreme Court, plaintiffs therefore withdraw their motion for discovery and consent that this action may proceed to

trial without their being allowed to conduct the discovery authorized by this Court's order of December 14, 1978.

SUTIN, THAYER & BROWNE
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By_____
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STATE OF NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

ELIZABETH COWPER, et al., Plaintiff, v. Defendant.	No.CV-78-06242 Filed in My Office This March 7, 1979 Eloise E. Young, Clerk District Court

MOTION TO VACATE DISCOVERY ORDER

Plaintiffs move the Court to vacate the discovery order entered on December 14, 1978 upon their motion, on the ground that plaintiffs have withdrawn their discovery motion in

order that this case may proceed to trial as scheduled on March 26, 1979.

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Supreme Court, U.S.
FILED
JUN 11 1979
MICHAEL RODAK, JR., CLERK

IN THE

United States Supreme Court

October Term, 1978

No. 78-1671

STATE OF NEW MEXICO, ex rel.
DODSON INSURANCE GROUP,
Appellant,

vs.

THE HONORABLE JAMES A. MALONEY,
JUDGE OF THE DISTRICT COURT,
SECOND JUDICIAL DISTRICT,
Appellee.

On Appeal From
The Supreme Court of New Mexico

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR REMAND

June 11, 1979

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IN THE

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vs.

THE HONORABLE JAMES A. MALONEY,
JUDGE OF THE DISTRICT COURT,
SECOND JUDICIAL DISTRICT,
Appellee.

On Appeal From
The Supreme Court of New Mexico

Appellee's Brief in Support of The Motion to Dismiss or Remand fails to address the specific points and authorities raised in the Jurisdictional Statement, fails to present accurately the state of the proceedings and pleadings below, and falls short of the burden placed upon it in proving the prerequisites for the remand the Appellee seeks. For these reasons, as more fully explained below, Appellant, Dodson Insurance Group (hereinafter Dodson) requests that the Motion to Dismiss or Remand be denied, that probable jurisdiction be noted, and that the matter be set for full briefing and oral arguments.

POINT I

The Order of the New Mexico Supreme Court Quashing the Writ of Superintending Control and Denying the Writ of Prohibition is a Final Judgment.

At page two of the Jurisdictional Statement Dodson cited five cases in which this Court has unequivocally held that decisions of state courts granting or denying writs, whether writs of superintending control or writs of prohibition, are final judgments or orders subject to review under 28 U.S.C. §1257(2). No contrary authority whatsoever was cited in Appellee's brief.

After unnecessarily explaining the purpose of a writ of superintending control, Appellee attempted to distinguish the five cases by claiming that they deal with prohibition and not with superintending control. This reasoning misses the mark for at least two reasons. First, *Fisher v. District Court of the 16th Judicial District*, 424 U.S. 382 (1976), one of the five cases cited by Dodson in the Jurisdictional Statement, held that a state court decision dealing with a writ of superintending control is a final judgment within the ambit of §1257(2). Thus, even if Dodson had applied only for a writ of superintending control, the denial of that writ would still be a final judgment. Secondly, Dodson did petition the New Mexico Supreme Court for a writ of prohibition. The Petition, as evidenced by the record certified by the New Mexico Supreme Court, is entitled "Petition for Writ of Superintending Control *or in the Alternative for Writ of Prohibition*." (Emphasis Added). Thus, when Appellee admits at page 4 of its brief that a determination as to a lower court's jurisdiction is final and appealable, Appellee thereby also admits that the New Mexico Supreme Court Order from which Dodson now takes its appeal is a final judgment. Dodson sought a writ of prohibition and the Supreme Court of New Mexico refused to grant that writ of prohibition. That refusal is a final judgment.

A case directly on point is *Bandini Petroleum Company v. Superior Court*, 284 U.S. 8 (1931). The appellant in that action applied to an intermediate appellate court and then to the California Supreme Court seeking a writ of prohibition restraining the lower court from enforcing a preliminary injunction. The appellant claimed that the statute, pursuant to which the preliminary injunction was granted, was unconstitutional and

the lower court therefore had no jurisdiction. The California appellate courts denied the writ of prohibition and the appellant then sought review with this Court. The Court had no problem in dealing with the question of jurisdiction.

> "This Court has jurisdiction. The proceeding for a writ of prohibition is a distinct suit, and the judgment finally disposing of it is a final judgment within the meaning of §237(a) of the Judicial Code." 284 U.S. at 14.

The further statement on page 4 of the Appellee's brief that the proceeding in the New Mexico Supreme Court had nothing to do with the jurisdiction of the trial court misapprehends and ignores the very document presented to the Supreme Court as the basis for the Writ. Paragraph 4 of Dodson's Petition alleges that the propriety of granting the Writ of Prohibition

> "arises out of actions and proposed actions of the Respondent in excess of his proper and legal jurisdiction in a workmen's compensation suit. The remedy of prohibition will lie for the court is without jurisdiction or is about to exceed it."

Appellee also contends that the New Mexico Supreme Court Order was interlocutory, citing authorities to the effect that final orders must terminate litigation. Appellee again misses the mark. The citation of these authorities was unnecessary and irrelevant to the issue now before the Court. The order on appeal before this Court is the order of the New Mexico Supreme Court, not the order of the trial court. Nothing further remains to be done in the New Mexico Supreme Court case. The original proceeding in the New Mexico Supreme Court on the Petition for a Writ has terminated. The relief Dodson sought has been denied. The order of the New Mexico Supreme Court unquestionably is final.

Dodson recognizes that the *trial* court has yet to conduct a trial on the merits, but the fact has no bearing on whether the New Mexico *Supreme Court* order is final. *See Hudson Distribution, Inc. v. Eli Lilly & Co.*, 377 U.S. 386, footnote 4 (1964). In *Fisher v. District Court of the 16th Judicial District, supra, Pan American Petroleum Corp. v. Superior Court of Delaware in and for Newcastle County*, 366 U.S. 656 (1961), *Madruga v. Superior Court*, 346 U.S. 556 (1954) and *Bandini*

Petroleum Company v. Superior Court, supra, additional matters remained to be decided before final judgment could be entered on the merits of the controversy. This did not prohibit this Court from noting jurisdiction to hear those appeals. In short, writs fall within a distinct category yet Appellee failed to refer the Court to any cases analyzing the propriety of hearing an appeal from the denial of a writ.

Without reference to any authority, Appellee states at page 6 of its Brief that this Court should consider the underlying subject matter of the order in determining the presence of jurisdiction. This approach cannot stand. In the cases just cited by Dodson, the underlying subject matter of the trial court's order did not enter into a determination of whether the highest court in the state entered a final judgment in the independent, original proceedings seeking a writ. For example, in *Bandini, supra*, the only judgment with which the Court was concerned was the judgment that

> "dealt with the jurisdiction of the superior court on the suit for injunction, and the only question before us is whether the District Court of Appeal erred in deciding the federal questions as to the validity of the statute upon which that jurisdiction was based. Moreover, with all questions of fact, or with questions of law which would appropriately be raised upon the facts adduced in the trial of the case in the Superior Court, as a court competent to entertain the suit, we are not concerned on this appeal." 284 U.S. at 14.

Even if Appellee could properly insist that this Court should consider the substance and underlying subject matter of the order, Appellee improperly portrays the underlying dispute. The underlying dispute is not a run of the mill discovery order in which a federal district court examines the scope and extent of discovery; the argument here revolves around the state court's order that Dodson *pay* for the Plaintiff's discovery, whatever that discovery may be. Since the order to pay for the discovery does not depend upon who obtains a favorable judgment on the merits, the trial court has reached a final decision. A federal appellate decision under 28 U.S.C. §1291 concerning the scope and extent of discovery cannot and should not be equated with a

state supreme court decision determining that the trial court had jurisdiction to command a party to expend certain monies in support of its opposing party's claim.

Appellee cites cases demonstrating that the requirement of finality remains a policy embodied in §1257. Dodson does not now contend, nor has it ever contended, that §1257 requires anything but a final judgment or order. The point raised by Dodson and not fully answered by Appellee, is that the denial of the Writ of Superintending Control and the denial of the Writ of Prohibition was just such a final judgment.

The case cited by Appellee to support its contention that Dodson would have a right to appeal that portion of a judgment taxing costs simply does not stand for that proposition. *Ruidoso State Bank v. Brumlow*, 81 N.M. 379, 467 P. 2d 395 (1970) states that mere pecuniary loss fails to confer the right of appeal on a party. The party must also be aggrieved in the legal sense. Dodson reiterates that as the prevailing party at the trial, even though compelled to pay for Plaintiffs' discovery, Dodson might not be aggrieved on the legal sense. If, as here, the constitutional issues cannot be preserved for appeal, the order should be considered a final judgment. *North Dakota State Board of Pharmacy v. Snyder Drug Stores, Inc.*, 414 U.S. 156, 162 (1973).

Appellee cites authority to the effect that certain types of interlocutory orders are not appealable. Again, Dodson does not disagree. What is now before the Court, however, is not an interlocutory order; it is a final decision of the New Mexico Supreme Court denying a writ of prohibition and quashing a writ of superintending control.

In short, Appellee cites no authority for the proposition that a decision by the New Mexico Supreme Court denying a writ of prohibition and quashing a writ of superintending control is not final. The general cases Appellee cites are not on point and do not deal with the specific issues now presented to the Court. No relevant authority is cited to contradict the cases put forth by Dodson in the Jurisdictional Statement.

POINT II

The Constitutional Issue was Raised and Considered and the Decision of the Supreme Court Had the Effect of Upholding the Validity of the Statute.

Appellee does not dispute that Dodson raised and argued the constitutional questions. Appellee does devote several pages of its Brief to the contention that a state court must have decided the constitutional issues before the Court can entertain jurisdiction. Dodson has never contended to the contrary. What Dodson has contended and demonstrated in its Jurisdictional Statement is that the necessary effect of the decision of the New Mexico Supreme Court was to uphold the constitutionality of the statute. Jurisdictional Statement pp. 7-9.

Appellee cites *Durley v. Mayo*, 351 U.S. 277 (1956) and *Stembridge v. Georgia*, 343 U.S. 541 (1952) to show that if the judgement *might* have been based on a non-federal ground, the Court has no jurisdiction to hear an appeal, but even in the *Durley* case, the Court expressed limitations on that concept.

> "It is likewise well settled that if the independent [State] ground was not a substantial or sufficiant one, it will be presumed that the state court based its judgment on the law raising the federal question and this court will then take jurisdiction." See *Williams v. Kaiser*, 323 U.S. 471, 478 (1945).

Whether an independent and substantial state ground exists is a question of state law. *Durley v. Mayo, supra*, at 283-284. Appellee referred the Court to no state law, but merely surmised that the New Mexico Supreme Court decided to postpone the consideration of the constitutional issues until after an appeal is taken.

No substantial or sufficient state ground exists to explain the quashing of the writ. Dodson demonstrated at pages 8 and 9 of its Jurisdictional Statement through pertinent state cases that if the New Mexico Supreme Court had found that the statute contravened the Constitution, then the granting of a writ of prohibition would be mandatory. Dodson contended that the payment of the discovery costs pursuant to court order while awaiting an appeal would constitute a temporary taking of property proscribed by the due process and equal protection clauses of the Constitution. *Fuentes v. Shevin*, 407 U.S. 67, 84 (1972). Since a writ will issue if a constitutional violation is presented, by dismissing the writ the New Mexico Supreme Court

necessarily concluded that there was no violation of the Constitution, temporary or otherwise. The necessary effect of the dismissal of the writ was to uphold the validity of the statute pursuant to which the trial court entered it order.

This Court may not now assume that the New Mexico Supreme Court erroneously concluded that it could preserve the constitutional issues by remanding the action to the trial court. *Maguire v. Tyler*, 8 Wall. 650, 665 (1869). *Neilson v. Lagow*, 12 How. 98, 110 (1851). These two early Supreme Court cases were cited with approval in *Williams v. Kaiser,supra*. Such a remand would promote the constitutional violation, albeit perhaps temporary in nature, instead of correcting the error.

Lynch v. New York, ex rel. Pierson, 293 U.S. 52 (1934) affirms that the decision of the New Mexico Supreme Court need not have expressly stated the reason for its holding; it is only necessary that the record disclose that "the judgment as rendered could not have been given without deciding [the constitutional issues]." 293 U.S. at 54. The writ could not be denied without deciding the constitutional issues adversely to Dodson. See Jurisdictional Statement pp. 7-9. *Street v. New York*, 394 U.S. 576 (1969) and the other cases cited at page 7 of the Jurisdictional Statement establish that the judgment need not expressly state the decision if the necessary effect of the decision is to uphold the validity of the statute.

Because there is no showing of any viable, substantial or sufficiant state grounds, and because the necessary effect of the decision by the New Mexico Supreme Court was to uphold the validity of the statute, the record fully discloses that the federal question was decided by the New Mexico Supreme Court.

POINT III

The Representations by Plaintiffs That They Will not Seek the Discovery Ordered by the Trial Court Fail to Render the Case Moot.

Appellee devotes seven pages of its Brief to a discussion of principles of mootness. Again, Dodson does not contend that the doctrine of mootness does not exist. The only question is whether the doctrine of mootness applies to the facts of this

case.

Specifically, the issue to be decided by the Court is whether the representations found at page 19 and 20 of Appellee's brief are sufficient to moot out the case despite the continuing existence of a court order compelling Dodson to underwrite Plaintiffs' discovery. Within the last year the Court has considered this point and has concluded that such a representation. even one made in good faith, does not moot out an appeal. A voluntary withdrawal from a program at issue

> "in no way mooted the Court of Appeal's prior determination that the program was being operated in violation of federal law. *See United States v. W.T. Grant Co.*, 345 U.S. 629.
>
> By granting the defendants motions to dismiss, as it was bound to do if the case was indeed moot, the District Court rendered the entire proceeding a nullity. There is no longer any judgment binding on the defendants to prevent them from returning to the old program. *And, while the defendants' good faith representation that they had no intention of doing so might properly have lead the District Court to deny injunctive relief, Hecht Company v. Bowles*, 321 U.S. 321, *it could not operate to deprive the successful Plaintiff, and indeed the public, of a final and binding determination of the legality of the old practice. United States v. W.T. Grant Co.*, supra, 345 U.S., at 632. *Quern v. Mandley*, 436 U.S. 725, Footnote 7 (1978). (Emphasis Added).

Appellee relies heavily on *DeFunis v. Odegaard*, 416 U.S. 312 (1974). The reference to selected portions of the *DeFunis* opinion, however, ignores the portions of that decision relevant to the present issue.

> "There is a line of decisions in this court standing for the proposition that the 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.' *United States v. W.T. Grant Co.*,345 U.S. 629, 632 (1953); *United States v. TransMissouri Freight Association*, 166 U.S. 290, 308-310 (1897); *Walling v. Helmerich & Payne, Inc*,

323 U.S. 37, 43 (1944); *Gray v. Sanders*, 372 U.S. 368, 376 (1963); *United States v. Phosphate Export Association*, 393 U.S. 199, 202-203 (1968). *These decisions and the doctrine they reflect would be quite relevant if the question of mootness here had arisen by reason of the unilateral change in the admissions procedures of the law school.* For it was the admissions procedures that were the target of this litigation, and a voluntary cessation of the admissions practices complained of could make this case moot only if it could be said with assurance that 'there is no reasonable expectation that the wrong will be repeated.' *United States v. W.T. Grant Co., supra*, 345 U.S. at 633. Otherwise, 'the Defendant is free to return to his old ways.' *Id.* at 632, and this fact would be enough to prevent mootness because of the 'public interest in having the legality of the practices settled.'" 416 U.S. at 318. (Emphasis added).

The withdrawal by Plaintiffs in the instant case was voluntary and unilateral so the line of cases just cited would apply. Further, there is a reasonable expectation that the wrong will be repeated, despite the good faith assurances to the contrary. The only reason that Plaintiffs have given for voluntarily ceasing their insistence on the discovery is that they wish to proceed to trial as soon as possible. Appellee's position disregards the New Mexico Supreme Court stay of proceedings entered in April. That Writ of Prohibition, which includes a stay and a reinstatement of the discovery order, is appended hereto at page 17, *infra*. As soon as this appeal is determined by this Court, Plaintiffs will then obtain their trial setting and will no longer have any reason for abandoning their claim to this discovery. Furthermore, Plaintiffs have abandoned only the claim of right as to the precise discovery sought in their motion. They have not abandoned their claim as to any other discovery they may seek in the future. In fact, in view of the complex, underlying factual dispute it is highly probable that they will seek additional discovery at Dodson's expense.

This situation is analogous to *Carpenters Union v. NLRB*, 341 U.S. 707 (1951) in which the Court observed that the conduct sought to be proscribed was "merely a sample of what

might be repeated elsewhere if not prohibited. *The underlying dispute between Petitioners and Watson's has not been shown to be resolved."* 341 U.S. at 715. (Emphasis added). The underlying dispute between Dodson and Plaintiffs has not been resolved. The very conduct which Plaintiffs have presently abandoned with regard to one deposition might very will be repeated as to other depositions. This would be very similar to *Brooks v. Flagg Brothers, Inc.*, 63 F.R.D. 409, 413 (C.D. N.Y. 1974) in which the district court condemned a party for attempting to keep practices from judicial scrutiny by quick settlements or apologies.

In addition to the probability that this conduct will be repeated again, the appeal presents an issue of great public importance not only to Dodson, but also to the State of New Mexico and any person or entity involved in workmen's compensation lawsuits. All workmen's compensation actions in New Mexico are resolved through litigation in district courts. Dodson and many other carriers continue to write workmen's compensation policies in the State of New Mexico. When the egregious violations of fundamental principles of due process of this case are multiplied by the hundreds, if not thousands, of workmen's compensation claims filed in New Mexico each year, the ramifications assume added importance. The voluntary cessation by Plaintiffs of their unconstitutional efforts to obtain discovery at Dodson's expense cannot at this juncture moot out a question of significant public importance. *DeFunis v. Odegaard, supra.*

Appellee states at page 20 of its Brief that a party pursuing a particular claim may moot the issue by dropping that claim completely. That is apparently not the law in New Mexico, for Plaintiffs attempted to drop their claim and to withdraw their proposed discovery, but that attempt was struck down by the New Mexico Supreme Court in Cause No. 12422. Therefore, despite the attempt to withdraw the motion, the motion has not been withdrawn and the New Mexico Supreme Court has restored the order compelling Dodson to finance the Plaintiff's discovery.

Moreover, the authorities Appellee cited regarding withdrawal of claims do not support Appellee's contention. Wright, Miller and Cooper refer to *W.T. Grant, supra*, and

squarely indicate that there is no unilateral right to withdraw claims at any time. 13 Wright, Miller and Cooper, *Federal Practice and Procedure*§ 3533 at 271, 282 and Vol. 7 §2364. *See also* Federal Rule of Civil Procedure 41(a) and Supreme Court Rule 60. *Kimball v. Kimball*, 174 U.S. 158 (1899) and *Mills v. Green*, 159 U.S. 651 (1895) point out that external influences or actions by an appellant may moot an appeal, but unilateral actions by an appellee do not have the same effect.

Appellee's reliance on *Lunz v. Preiser*, 524 F.2d 289 (2d Cir. 1975) is misplaced. Besides the fact that the case is questionable authority in view of *W.T. Grant, DeFunis* and other such cases, it is also distinguishable on the grounds that the plaintiff in that action obtained the relief he sought from the defendants that he had sued. The *Lunz* case more properly stands for the proposition that when a defendant provides a plaintiff with the relief he seeks, the case is resolved. A contrary situation is presented here. Plaintiffs have not obtained the relief they seek; Plaintiffs have not abandoned their claim that they may be entitled to additional or further discovery at Dodson's expense; Dodson continues to refuse to submit to their demands; and the underlying dispute between Dodson and Plaintiffs remains unresolved.

The lengthy discourse on mootness by Appellee fails to assist his claim that this case is moot. Dodson concedes the existence of a doctrine of mootness; cases such as *W.T. Grant, supra,* however, demonstrate that the doctrine of mootness do not apply to this case.

POINT IV

The Appeal Presents Substantial Federal Questions Appropriate for Resolution by This Court

Point III of the Brief in Support of Motion to Dismiss or to Remand argues that the petition to this Court should be dismissed because it presents no substantial federal question. In this section, Appellee cites general principles concerning the substantiality of a federal question with which Dodson has no disagreement, but which fail to address the specifics of the instant case. Moreover, Appellee confuses the question of substantiality with the issue of mootness as shown by the summary

statement in Appellee's Brief, p. 21, and reliance on *Little v. Brown*, 134 U.S. 547 (1890), pp. 23-24 of Appellee's Brief.

Appellee cites *Debacker v. Brainard*, 396 U.S. 28 (1969) and *United States Fidelity and Guaranty Co. v. State of Oklahoma*, 250 U.S. 111 (1919) but these cases plainly signify that the federal question, i.e., the constitutionality of NMSA §52-1-34 1978, must be drawn in question. There is no doubt that this was done. Appellee's use of *Abrams v. Van Schaick*, 293 U.S. 188 (1934) is factually inapposite since *Abrams* involved a situation in which a dispute had not yet arisen as opposed to the present situation in which an order of the court is in effect and compels payment from Dodson.

Zucht v. King, 260 U.S. 174 (1922) and *Equitable Life Assurance Society v. Brown*, 187 U.S. 308 (1902) stand for the proposition that the Court will not hear federal questions already determined by prior decisions. As Dodson pointed out in its Jurisdictonal Statement, pp. 12-13, the issue now before the Court has not been previously decided. Nowhere did Appellee respond to this point. At no time has Appellee contended that the questions raised are foreclosed by prior decisions of this Court. Appellee quite simply, does not address the issue of whether the four questions presented at page 4 of the Jurisdictional Statement are substantial.

Dodson presently is under court order to expend money in financing Plaintiffs' lawsuit. Dodson's efforts to vindicate its position that the order violates fundamental constitutional rights are now impugned as dilatory tactics despite the fact that the outcome of this appeal will have a substantial bearing on how this and other workmen's compensation lawsuits in New Mexico will proceed. Rather than discuss whether the questions raised on page 4 of the Jurisdictional Statement are substantial as defined in *Zucht, supra*, Appellee chooses to malign Dodson's motive. In addition to constituting improper argument, Appellee's attack *ad hominem* leaves untouched Dodson's contention that the questions are, indeed, substantial.

POINT V

The Court Should Leave Intact the Stay Granted by the New Mexico Supreme Court.

Following the filing of the Notice of Appeal, in a separate proceeding before the New Mexico Supreme Court, No. 12422, Dodson obtained a Writ of Prohibition. That Writ of Prohibition stayed all proceedings in the trial court pending the resolution of this appeal from action No. 12345. If this Court now remands the case for trial, it will overrule an order not presently before the Court.

The "most compelling justification...to upset an interim decision...would be to protect this court's power to entertain a petition..." *New York v. Kleppe*, 429 U.S. 1307, 1310 (1979). Such a justification does not exist in this case. The New Mexico Supreme Court entered its stay order to preserve the appellate jurisdiction of this Court. The dissolution of the stay would erode rather than preserve the Court's jurisdiction. 28 U.S.C. §1651 grants the Court jurisdiction and power to take such steps as are necessary to preserve the rights of the parties pending final determination of the cause, but the same statute does not give the Court authorization to erode its own jurisdiction. *c.f. Meredith v. Fair*, 83 S. Ct. 10 (1962).

Appellee contends that jurisdiction of the entire cause has not been transferred to the Supreme Court. Brief pp. 25-26. If that is true, then the only matter over which this Court presently has jurisdiction is the order denying the Writ of Prohibition. All other matters would remain in the New Mexico courts. The court having jurisdiction over the remainder of the cause, the New Mexico Supreme Court, has already stayed the proceedings. This court would have no jurisdiction to overrule the stay ordered by the New Mexico Supreme Court.

The court in *Magnum Import Company v. Coty*, 262 U.S. 159 (1923) made it perfectly clear that motions of this sort should first be presented to the lower court for determination. After Dodson obtained the stay of proceedings, Plaintiffs failed to petition for rehearing. If Plaintiffs or Appellee wish to have the New Mexico Supreme Court ruling overturned, they may petition for rehearing, file an appeal or petition for a writ of certiorari. They may not do indirectly what they did not do directly.

The decision of the New Mexico Supreme Court to stay the proceedings below was made after receiving briefs and hearing arguments of counsel on two separate Writs of Prohibition. The

New Mexico Supreme Court, being well versed in New Mexico law, being fully aware of the various equities involved, and being fully cognizant of the pendency of this appeal, prohibited the trial court from acting any further and entered a stay order pending the determination of this appeal.

Because the New Mexico Supreme Court is more familiar with this case, its determination that the stay was warranted is deserving of great weight. To dissolve the stay previously entered by the New Mexico Supreme Court would require "an extraordinary exercise of judicial power that only the most compelling considerations could warrant." *Cunningham v. English*, 78 S. Ct. 3 (1957). Interim determinations of lower courts are disturbed only upon "the weightiest considerations". *O'Rourke v. Levine*, 80 S. Ct. 623 (1960). Since the lower court is "best and most convieniently able to exercise the nice discretion needed,...the determination of the application will ordinarily be left to it." *Virginia Railway Company v. United States*, 272 U.S. 658, 671 (1926). Great caution is the rule and the stay should be reversed only upon a showing of exceptional circumstances. *Commodity Futures Trading Commission v. British American Commodity Options Corp.*, 434 U.S. 1316, 1319 (1977); *Holtzman v. Schlesinger*, 414 U.S. 1304, 1308 (1973). Appellee has presented no such circumstances.

That other state courts have chosen in the past to remand cases for trial pending appeals, as Plaintiffs suggest, is of no assistance in this instance. The state court in this case, the New Mexico Supreme Court, has considered that alternative and has rejected it. Petitioners now improperly request the United States Supreme Court to overrule a decision by the New Mexico Supreme Court involving New Mexico trial procedure.

Appellees' prayer that this Court direct the New Mexico Supreme Court to vacate its Writ of Prohibition is unnecessary. As soon as this appeal is decided, the stay of proceedings contained in the Writ of Prohibition will expire of its own terms.

CONCLUSION

This case meets the requirements of 28 U.S.C. §1257(2). The order is final. The case is not moot. Substantial federal questions are presented. The Motion to Remand is not properly

before the Court, and even if properly presented, it fails to present adequate grounds for overturning the stay entered by the New Mexico Supreme Court. Dodson requests that jurisdiction be noted and that Appellee's motions be denied.

Respectfully submitted.

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Of Counsel

I hereby certify pursuant to Supreme Court Rule 33(3)(a) that on the Eleventh day of June, 1979 I caused three copies of the foregoing to be hand delivered to Ronald Segel, 600 First Plaza, Albuquerque, New Mexico; The Honorable James A. Maloney, Bernilillo County Courthouse, Albuquerque, New Mexico; and Harold Parker, 1300 Bank of New Mexico Building, Albuquerque, New Mexico, and that all parties required to be served have been served.

Mark B. Thompson, III
P.O. Box 2168
Albuquerque, New Mexico 87103
Attorney for Appellant

APPENDIX

IN THE SUPREME COURT
OF THE
STATE OF NEW MEXICO

DODSON INSURANCE GROUP,
Insurer,

Petitioner,

vs.

No. 12422

THE HONORABLE JAMES A. MALONEY,
Judge of the District Court,
Second Judicial District,

Respondent

ALTERNATIVE WRIT OF PROHIBITION

T O THE HONORABLE JAMES A. MALONEY
Judge of the District Court
Second Judicial District
Bernalillo County Courthouse
Albuquerque, New Mexico 87102

GREETINGS:

WHEREAS, a verified Petition for Writ of Superintending Control, or, in the alternative, for Writ of Prohibition (a copy of which is attached hereto), having been filed in the above-captioned matter; and

WHEREAS, the facts and laws set forth in said petition demonstrate that an alternative writ of prohibition should issue; and

WHEREAS, Petitioner has no plain, speedy, or adequate

remedy at law; and

NOW, THERFORE, you are prohibited from proceeding in Cause No. CV-78-06242 on the docket of your court until such time as the appeal to the United States Supreme Court concerning the order entered on December 14, 1978, in Cause No. CV-78-06242 is finally determined by the United States Supreme Court, and you are further ordered to vacate the order entered March 12, 1979, in violation of the stay ordered by the trial court on March 1, 1979; in excess of the trial court's jurisdiction; in violation of the doctrines of estoppel and law of the case; and in violation of the rules of procedure. You are further directed to show cause on the 28th day of March, 1979, why this writ should not be made permanent.

Petitioner's brief shall be filed on or before April 4, 1979.

Respondent's brief shall be filed on or before April 11, 1979.

Oral argument will be had on the matter on Wednesday, April 18, 1979, at 9:00 A.M., in the Supreme Court Hearing Room, Supreme Court Building, Santa Fe, New Mexico.

Service of this Alternative Writ of Prohibition with a copy of the Petition attached shall be made on Respondent and counsel for the real parties in interest by delivering copies to Respondent, counsel for Plaintiffs below, and Atkinson & Kelsey, co-counsel for the New Mexico Restaurant Association.

WITNESSETH the Honorable Dan Sosa, Jr., Chief, Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 21st day of March, 1979.

Rose Marie Alderete

Clerk of the Supreme Court of New Mexico

IN THE SUPREME COURT
OF THE
STATE OF NEW MEXICO
Wednesday, April 18, 1979

No. 12,422

DODSON INSURANCE GROUP,

Petitioner,

vs. Original Proceeding on Superintending Control or Prohibition

HON. JAMES A. MALONEY,

Respondent.

This matter coming on for consideration by the Court upon the alternative writ with copy of petition attached, response to writ and briefs of counsel, and the Court having considered the matter and having heard oral argument and now being sufficiently advised in the premises;

NOW,THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the alternative writ heretofore issued in the above entitiled cause on March 21, 1979, be and the same is hereby made permanent.

ATTEST: A TRUE COPY
ROSE MARIE ALDERETE
Clerk of the Supreme Court
of the State of New Mexico